

accordingly failed. The Defendants put forward two other defences namely:—(a) that the Plaintiffs accepted a larger amount of yolk eggs in lieu of and in substitution for the total amount of shell eggs and yolk eggs originally contracted for, and (b) that there was a novation in that McAlister & Company were substituted for the Defendants on the Contract.

With regard to these two defences the learned Trial Judge held with regard to (a) there was no evidence of this but evidence contra and with regard to (b) he held that in fact there had been no novation.

The case having been decided almost entirely on fact it is unnecessary to set out the whole of the arguments or of the written judgment. Two questions however were dealt with by the learned Trial Judge which were of novel application in the Colony.

TERRELL, J. (the learned Trial Judge) after dealing with the matters referred to above proceeded as follows in giving Judgment.

As regards the measure of damages, this raises the only real difficulty in the case. After considerable argument it was agreed that the proper measure of damages is the rent for one month for the space, 79,903 cubic feet, which the Defendants did not in fact occupy. The letter of the 8th August, which contains the terms which were accepted by the Defendants, states:

‘Our charge for storage would be on the basis of twenty five (25) cents per cubic foot per week or part thereof’

and

‘It is to be understood that storage would be for not less than one month.’

The Defendants contend that ‘month’ means lunar month and that the gross amount for which they are liable cannot exceed \$79,903 subject to certain deductions. The Plaintiffs, on the other hand, claim that ‘month’ means ‘calendar month’ and that as August contains more than 28 days, payment should be for a minimum of 5 weeks.

It is to be noted that the Plaintiffs themselves when they sent in their bill on the 16th August, adopted neither construction and claimed \$122,416.66 for one month’s storage rent in respect of 113,000 cubic feet. It is difficult to see how this figure is arrived at, but it would appear that they charged for 31 days at the rate of 25 cents per cubic foot per week. This is what they may have intended, but it certainly is not what they have said.

I think that the construction of the contract is a question or issue ‘with respect to mercantile law’ within the meaning of section 5 (1) of Ordinance No. 111 (Civil Law), and accordingly the law to be administered is the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, and in view of section 61 of the Law of Property Act 1925 there can be no doubt that in the construction of contracts in England ‘month’ *prima facie*

means ‘calendar month’ unless the contract otherwise requires.

It was argued by the Defendants that in this particular contract ‘month’ must mean a month of 4 weeks, otherwise the contract would mean that the Defendants had to pay in any event for 5 weeks’ storage, and this is not what the contract says. But I do not see any inconsistency in the contract providing that the space should be occupied for not less than 31 days, while in another part of the contract provision should be made for payment at the rate of 25 cents per cubic foot for a week or part of a week. In effect of course the Defendants would have to pay the same whether they occupied the space for 31 days or for 35 days, and I cannot see that this circumstance compels me to reject the ordinary meaning which should now be attributed to the word ‘month’. The Plaintiffs applied to amend the particulars of their claim for damages, but as all the relevant facts had been pleaded I did not think that any such amendment was necessary.

[APPELLATE CRIMINAL JURISDICTION.]

BURTON, Ag. C.J.; TERRELL & WILLIAMSON, JJ.
July 23, 1935.

REX v. TAN AH SENG.

[SINGAPORE CRIMINAL APPEAL No. 9 of 1935]

Criminal misappropriation—money entrusted for a criminal purpose—Penal Code, S. 406.

A prosecution will lie for criminal misappropriation of money entrusted to a person even if it has been entrusted to him for a criminal purpose.

Yong Ah Kim v. Lee Kee Chiang, 1905 S.S.L.R. 142 over-ruled.

Magistrate’s Appeal.

The facts and arguments sufficiently appear from the Judgment.

Worley, Deputy Public Prosecutor for the Crown.

Respondent in person.

Cur. Ad. Vult.

BURTON, AG. C. J., TERRELL, J. AND WILLIAMSON, J.—Tan Ah Seng, the respondent, was charged before the Third Magistrate Singapore with Criminal Breach of Trust under section 406 of the Penal Code. The facts were never fully investigated but for the purposes of this appeal it must be assumed that the respondent received \$40 for the purpose of renting a house to be used by some prostitutes and misappropriated it. The Magistrate acquitted the accused without calling upon him for his defence on the ground that the transaction was an illegal contract.

The justification for this order is no doubt to be found in the case of *In the Matter of Yong Ah Kim, complainant v. Lee Keng Chiang*, (1905) S.S.L.R. 142 in which Fisher, J. held that a prosecution will not lie for criminal misappropriation of money paid to a person for a criminal purpose.

In that case Yong Ah Kim gave Lee Keng Chiang \$4 with which she commissioned him to bribe the Chinese Interpreter of a Police Court, but instead of attempting to bribe the Interpreter he converted the money to his own use.

The reasoning of this decision is based firstly on a proposition of law summed up by Lord Mansfield as "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act" and Fisher, J. concluded that "the prosecutrix could not have recovered by civil process the money with which she entrusted the prisoner." But the former of these propositions has no application to the criminal law; and the latter is incorrect. It is clear law that the money could have been recovered back by the prosecutrix at any time before the illegal purpose was carried out [*Taylor v. Bowes*, (1876) 1 Q.B. 291] and in our case, as in the Penang case *ex hypothesi* the illegal purpose was never carried out. Fisher, J. relies next on *R. v. Hunt*, 8 C. & P. 642, but that case merely turned on the difficulty of laying in the indictment the ownership of the property embezzled; a difficulty which does not concern us. It was not followed in *Reg. v. Stainer*, (1870) 11 Cox 483 nor *Reg. v. Tankard*, (1894) 1 Q.B. 548, but these cases do not help us because they are under a special Act. It was not followed too by O'Malley, C.J. in *Reg. on the prosecution of Arshit v. Kassim*, 1891 Straits Law Reports 84, and Fisher, J. does not appear to have considered this case.

The third ground of the decision is that there was no dishonesty. The learned Judge held that the complainant having no civil remedy, has suffered no wrongful loss; and then he goes on to say:—

"On the other hand it seems *prima facie* arguable that the defendant has 'done something with the intention of causing wrongful gain to another,' i.e., himself, because he has clearly gained by means which would seem unlawful, property to which he was not legally entitled. But as his 'wrongful gain' if that is so, is the exact measure of the complainant's not 'wrongful' loss, and as it was acquired by the breach of a promise which was never binding, but void *ab initio* because its performance would have been unlawful, it seems difficult to see how he can logically be convicted under the other head of the section either."

But we are unable to follow this reasoning. It seems to us perfectly plain that when a person who has received \$4 to bribe a detective, puts that \$4 into his own pocket, he has wrongfully gained that \$4, apart from all question of wrongful loss by the complainant.

We are of opinion therefore that this case was wrongly decided; no other authority for the proposition has been cited to us, and for the decision of the present appeal we are content to rely on the plain wording of section 405 of the Penal Code:—

"Whoever being in any manner entrusted with property....."

which is clearly wide enough to cover the present case; and we see no reason by refining the plain meaning of these words to allow a man to escape punishment for one crime because he has cons-

pired with the complainant to commit another.

The appeal should be allowed and the order of acquittal set aside and the case should be remitted to another Magistrate to be tried on its merits.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION.]

BURTON, AG. C. J.

September 24, 1935.

REX v. MOHAMED BIN SUDIN & ANOR.

[SINGAPORE MAGISTRATE'S APPEAL No. 26 of 1935]

Criminal Procedure Code Section 309.

Under Section 309 of the Criminal Procedure Code the Court in the due exercise of its discretion will decline to give a successful respondent the costs of the trial unless it is shown that the prosecution was vexatious, that is, begun or continued without reasonable and probable cause or frivolous.

Stubbs v. The Director of Public Prosecutions, (1890) 24 Q.B.D. 577 followed.

Magistrate's appeal.

The accused were acquitted by a Magistrate on charges of bribery and the Crown appealed against the acquittal. The appeal was dismissed without the Respondents being called on whereupon the Respondents' counsel applied for costs.

Worley (D.P.P.) for the Crown.

Page for Respondents.

The facts and arguments are sufficiently set out in the Judgment below.

Cur. Ad. Vult.

BURTON, AG. C.J.—The two accused were acquitted on charges of bribery by the second Magistrate and the Crown appealed. I dismissed the appeal without calling on the respondent, and Mr. Page then applied for costs under section 309 of the Criminal Procedure Code. The Code gives an absolute discretion to the Court in awarding costs but it is difficult to discover on what principle they should be awarded. The only recent case in the Colony in which costs have been awarded against the Crown in an appeal from an acquittal is *R. v. Ramasamy*, (1930) S.S.L.R. 104. But in that case Murison, C.J. accepted the principle of the Indian Courts that an appeal on the facts in a criminal case should not be entertained unless there has been such stupidity and perversity by the trial judge, or that he has so obstinately blundered or gone wrong that a miscarriage of justice has occurred. But this principle has recently been overruled by the Privy Council in *Sheo Swarup v. the King-Emperor*, 51 T.L.R. 10 who held that no such limitation is placed on the power of the Courts. Murison, C.J.'s judgment on the question of costs must have depended on his view of the law. He says:

"For a trial judge this was no doubt a borderline case; but for me as an appeal judge I find no difficulty whatever."

He thought that the appeal had no remote chance of success. It is clear that the principle has never been admitted that costs follow the event; there must be some exceptional circumstance. In the case of *Stubbs v. the Director of Public*